BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-02-1453-FOF-TP ISSUED: October 21, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
MICHAEL A. PALECKI

ORDER DENYING MOTIONS FOR RECONSIDERATION, CROSS-MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

BY THE COMMISSION:

CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August

15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike Cross-motion for Reconsideration, or in the Alternative, Response to FDN's Cross-motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3,2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

This Order addresses FDN's and BellSouth's Motions for Reconsideration, as well as the Cross-Motion for Reconsideration and Motion to Strike.

JURISDICTION

We have jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252 (e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we should utilize discretion in the exercise of such authority. In addition, Section

120.80(13)(d), Florida Statutes, authorizes us to employ procedures necessary to implement the Act.

We retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

FDN'S MOTION FOR RECONSIDERATION

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

We believe that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, we believe that FDN's Motion should be denied.

FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. FDN states that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice

unless the consumers exercised rights at just one specific point in time, prior to porting to an ALEC voice provider. Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to all qualified customers served by ALECs over BellSouth loops.

BellSouth responds that the Order states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." Order at 11. BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. We agree.

Although FDN argues that we overlooked a material aspect of the anticompetitive allegation, it fails to demonstrate that a point of fact or law has been overlooked. In our decision, we determined in part that BellSouth's practice of disconnecting its FastAccess Service unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. Order at 11. Further, we determined that this practice creates a barrier to competition in the local telecommunications market. Id. Consequently, we found that BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

We believe that we were clear in our decision requiring BellSouth to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. Id. The Order clearly demonstrates that we considered the arguments raised by FDN. Thus, FDN's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, FDN's motion is denied.

BELLSOUTH'S MOTION FOR RECONSIDERATION

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.

2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). We have applied this same standard in addressing BellSouth's motion.

We believe that BellSouth has failed to demonstrate that we made a mistake of fact or law in rendering our decision. Therefore, we deny BellSouth's Motion for reconsideration regarding this issue.

In its Motion, BellSouth states that we have improperly converted an arbitration under the Act into a state law complaint case. BellSouth argues that its FastAccess Internet Service is a nonregulated nontelecommuications DSL-based service. Thus, BellSouth concludes that it is not a service over which this Commission has jurisdiction. FDN responds that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. We agree. Section 251(d)(3) of the Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a state commission that:
>
> > (A) establishes access and interconnection obligations of local carriers;
> > (B) is consistent with the requirements of this Section [251];
> > (C) does not substantially prevent implementation of requirements of this section and the purposes of this part.

Order at 10. Further, we believe that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission's purpose in promoting competition is to ensure "the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9.

BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally-tariffed, wholesale ADSL telecommunications service on UNE loops is not discriminatory and therefore does not violate Section 202(a) of the Act. BellSouth states that the purpose of Section 706 of the Act is to encourage

the deployment of advanced services and that the Commission's decision does not seek to promote advanced services but to promote competition in the voice market. FDN responds that while it is true that one of the factors which prompted the Commission's decision was to promote competition in the local voice market, the Commission's Order supports deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barriers that limit consumer choice in the local voice market. We agree. As stated in the Order, we determined that Congress has clearly directed state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure." Order at 9.

BellSouth maintains that it is efficient for BellSouth to provide its FastAccess DSL service when it is providing the basic telephone service. FDN responds that if a customer cannot obtain cable modem service and BellSouth is the sole provider of DSL, BellSouth is put in a position of competitive advantage over ALECs. As stated in our Order, the Florida statutes provide that we must encourage competition in the local exchange market. Specifically, as set forth in Section 364.01(4)(g), Florida Statutes, the Commission shall "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . . " Order at 9. As addressed in the Order, we found that BellSouth's practice of disconnecting its FastAccess service when a customer changes to another voice provider is a barrier to entry into the local exchange market. Order at 4,8.

Furthermore, although BellSouth indicates that the D.C. Circuit Court of Appeals vacated the FCC's *Line Sharing Order* because the FCC failed to consider the competition in the market for DSL service, we do not believe that the same rationale in that decision is applicable here because that decision did not address competitive issues arising under state law in which a specific finding was made that the disconnection of the service was a barrier to local competition. Thus, we do not believe BellSouth has identified a mistake of fact or law by the Commission's lack of reliance on that decision.

BellSouth also requests that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises. FDN responds that BellSouth's provisioning proposal would be harmful and undermine the Commission's intent. Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant. Although the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN was not addressed in the Commission's Order, we believe that FDN's position is in line with the tenor of our decision. While the Order is silent on provisioning, we believe our decision envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers.

We indicated in our Order that our finding regarding FastAccess Internet Service should not be construed as an attempt to exercise jurisdiction over DSL service but as an exercise to promote competition in the local voice market. Order at 11. To the extent that BellSouth has requested that our decision be clarified in regards to the provisioning of its FastAccess Internet Service, we observe that the provisioning of BellSouth's FastAccess Internet Service was not specifically addressed by our decision. However, we contemplated that BellSouth would provide its FastAccess Internet Service in a manner so that the customer's service would not be altered. We note however, that there may be momentary disruptions in service when a customer changes to FDN's voice service. While we decline to impose how the FastAccess should be provisioned, we believe that the provision of the FastAccess should not impose an additional charge to the customer.

BellSouth asserts that for it to provision its FastAccess Internet Service over a UNE loop would be a violation of its FCC tariff. Although we acknowledge BellSouth's FCC tariff, we believe that we are not solely constrained by an FCC tariff. As indicated in our order, under Section 251(d) of the Act, we can impose additional requirements as long as they are not inconsistent with FCC rules, or Orders, or Federal statutes. We believe that BellSouth has failed to make a showing that our decision is contrary to any controlling law. Further, at the hearing, BellSouth's witness Williams testified that although it would be

costly, it would be feasible to track UNE loops. To the extent that these technical limitations can be overcome, we infer that it would be technically feasible to provision FastAccess on an FDN UNE loop.

In summary, although BellSouth has asserted that we overlooked a number of material facts, BellSouth has not identified a point of fact or law which was overlooked or which the we failed to consider in rendering our decision. Therefore, the motion for reconsideration shall be denied. However, we envisioned that BellSouth's migration of its FastAccess Internet Service to an FDN customer would be seamless. Consequently, we clarify that BellSouth's migration of its FastAccess Internet Service to an FDN customer shall be a seamless transition for a customer changing voice service from BellSouth to FDN in a manner that does not create an additional barrier to entry into the local voice market.

BELLSOUTH'S MOTION TO STRIKE

In its Motion, BellSouth seeks to strike FDN's Cross-Motion for Reconsideration because it believes it is an untimely motion for reconsideration. Rule 25-22.060(1)(b), Florida Administrative Code, provides for cross-motions for reconsideration. While Rule 25-22.060(1)(a), Florida Administrative Code, does limit certain types of motions for reconsideration, the limitation urged by BellSouth is not one of them.[1] Nor could it be reasonably implied, because the limitations enumerated in the rule restrict reconsideration of orders whose remedies have been exhausted or orders that are not ripe for review. More importantly, we have held that "[o]ur rules specifically provide for Cross-Motions for Reconsideration and the rules do not limit either the content or the subject matter of the cross motion." Order No. 15199, issued October 7, 1985, in Dockets Nos. 830489-TI and 830537-TL. Based on the foregoing, we find that BellSouth's Motion to Strike is denied.

[1]Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders.

FDN'S CROSS-MOTION FOR RECONSIDERATION

FDN believes that it faces a greater burden than BellSouth in the self-provisioning of DSL loops, because it faces higher costs, does not have the same access to capital, and would be unlikely to obtain transport back to the central office. FDN asserts that BellSouth has an advantage because it buys DSLAMs in bulk. However, witness Gallagher only testifies that when "you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap." FDN presented no evidence that BellSouth purchases DSLAMs in bulk or that BellSouth receives a discount on its purchase of DSLAMs. In fact late-filed Exhibits 12 and 13 indicate that the purchase prices for FDN and BellSouth are relatively the same.[2]

FDN also contends that the Commission overlooked evidence that even if the cost for DSLAMs were the same, FDN is impaired because as a smaller company it does not have the same access to capital as BellSouth. However, the only testimony presented was witness Gallagher's assertion that he does not have the same captive market and that he could not raise the money to collocate FDN's own DSLAM because "[t]he rates of return aren't there."

BellSouth responds that there is no evidence that BellSouth buys DSLAMS in bulk, nor is there support that BellSouth receives a bulk discount on DSLAMs or line cards. BellSouth contends that FDN's assertion that the Commission overlooked the FCC's guidance to consider the economies of scale in performing an impairment analysis is not correct. BellSouth states that FDN has failed to meet the impair standard and that the evidence shows that BellSouth has not deployed line cards in Florida that are capable of providing the broadband service FDN seeks to provide.

We believe that FDN has failed to show any evidence that we overlooked or failed to consider. We considered the arguments presented by FDN and found that "BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling." Order at 17. In so doing, we

[2]BellSouth late-filed exhibit 12 shows that BellSouth can purchase an 8-port DSLAM for $6,095, while FDN late-filed exhibit 13 shows that FDN can obtain an 8-port DSLAM for $6,900.

also found that "the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN." Id.

FDN also claims that we overlooked evidence that even if FDN were able to collocate a DSLAM it likely would not be able to obtain transport back to the central office. However, there was also evidence that BellSouth offers UNE subloops between the remote terminal and the central office, and that BellSouth would sell these UNE subloops at the rates established by us. Upon consideration of this competing evidence, we found that "there was evidence regarding several proposed alternatives of providing DSL to consumers served by DLC loops when an ALEC is the voice provider." Order at 16.

Finally, FDN asserts that we did not address FDN's ability to collocate xDSL line cards when BellSouth begins to deploy NGDLC in Florida. There was testimony that approximately seven percent of BellSouth's access lines were served by NGDLCs, but there was also testimony that combo cards were not used for BellSouth's xDSL service.

We did not overlook or fail to consider this issue, because the issue was not before us. While FDN does argue that it has met part three of the impair standard, it concludes by stating that "[t]herefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs." However, FDN fails to point out that an ILEC is only required to "unbundle[] packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal." UNE Remand Order ¶313. Even if the impair analysis could be read to apply in cases where BellSouth has deployed combo cards instead of DSLAMs, the unbundling requirement is only designed to remedy an immediate harm. The harm alleged by FDN is prospective because "none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data." Based on the foregoing, we believe that FDN has failed to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order.

The parties shall be required to file their final interconnection agreement within 30 days after the issuance of this

Order conforming with Order No. PSC-02-0765-FOF-TP, in accordance with Order No. PSC-02-0884-PCO-TP, Order Granting Extension of Time to File Interconnection Agreement. Thereafter, this Docket should remain open pending approval by us of the filed agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunication's Inc.'s Motion to Strike is hereby denied. It is further

ORDERED that Florida Digital Network, Inc.'s Cross-Motion for Reconsideration is hereby denied.

ORDERED that the parties shall file an interconnection agreement as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open pending the approval of the interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st Day of October, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-03-0395-FOF-TP ISSUED: March 21, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON

ORDER RESOLVING PARTIES' DISPUTED LANGUAGE

BY THE COMMISSION:

I. CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August 15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002,

Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

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We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3, 2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement. On October 21, 2002, Order No. PSC-02-1453-FOF-TP was issued Denying Motions for Reconsideration, Cross-Motion for Reconsideration and Motion to Strike.

On November 20, 2002, BellSouth filed its executed interconnection agreement with FDN. (On February 5, 2003 BellSouth filed a replacement agreement that contains updated Florida rates for unbundled network elements.) Although the parties were able to reach agreement on most points, disagreements remained as to the specific language that should be incorporated into the agreement to reflect the Commission's decision as to BellSouth's obligation " . . .to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." On this same date, BellSouth also submitted its Position in Support of its Proposed Contract Language (BellSouth Position), in which it sets forth its proposed language where there is a dispute; similarly, FDN's proposed language is contained in its Motion to Approve Interconnection Agreement filed contemporaneously (FDN Motion to Approve). On December 2, 2002, FDN filed a Response to BellSouth's Position in Support of Proposed Contract Language (FDN Response).

This Order addresses which language, where the parties are in disagreement, shall be included in the final executed interconnection agreement filed by BellSouth and FDN.

We are vested with jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes.

II. ANALYSIS

In its Position in Support of its Proposed Contract Language, BellSouth identifies seven major areas where the parties disagree as to the wording that should be reflected in their agreement. For ease of reference, we follow the format in BellSouth's filing, discussing the views and arguments of BellSouth and FDN on each area, and then provide separate findings as to language for each of the seven areas. Language in dispute will be underlined.

A. Section 2.10.1

BellSouth language:

> In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides BellSouth® FastAccess® Internet Service ("FastAccess") to an end-user and FDN submits an authorized request to provide voice service to that end-user, BellSouth shall continue to provide FastAccess to the end-user who obtains voice service from FDN over UNE loops.

FDN language:

> In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides xDSL services (as defined in this

> Section 2.10) to an end user and FDN submits an authorized request to provide voice service to that end user, BellSouth shall continue to provide xDSL services to the end user.

There are two aspects in dispute here.

1. FastAccess service v. xDSL services

BellSouth believes that we only ordered it to continue providing FastAccess, its high-speed Internet access service, when a customer migrates his voice service to FDN. FDN notes that other independent Internet service providers, such as Earthlink or AOL, can subscribe to BellSouth's tariffed interstate ADSL transport offering and offer a high-speed Internet access service in competition with BellSouth. FDN notes that under BellSouth's interpretation of our order, if a BellSouth voice customer who, e.g., receives AOL's high-speed Internet Access service switches his voice service to FDN, BellSouth would be allowed to discontinue the provision of the interstate ADSL service, thus eliminating the customer's AOL high-speed Internet access service. FDN asserts that we did not intend BellSouth's restrictive reading, which it believes is arbitrary, capricious, and unsupported by the record in this proceeding.

Finding

In the FDN order, we concluded: "Pursuant to Sections 364.01(4)(b), (4)(d), (4)(g), and 364.10, Florida Statutes, as well as Sections 202 and 706 of the Act, we find that for the purpose of the new interconnection agreement, BellSouth shall continue to provide its FastAccess Internet Access Service to end users who obtain voice service from FDN over UNE loops." (emphasis added) FDN contends that BellSouth bases its interpretation on "occasional" uses of the term "FastAccess" in our order. We note that FDN cites to nowhere in the record where we raised similar concerns pertaining to other ISPs.

We believe that the occurrence of the term "FastAccess Internet Access Service" in the ordering statement unequivocally supports BellSouth's language. Therefore, we find that BellSouth's language shall be adopted as set forth.

2. UNE loops v. UNE-P

BellSouth interprets our order narrowly, as only requiring them to continue providing FastAccess over a FDN UNE loop, but not over a UNE-P, if FDN were to subscribe to one. BellSouth asserts that the issue in the arbitration only dealt with FastAccess on UNE loops and that there is no record evidence regarding UNE-P. Moreover, BellSouth notes that as a facilities-based provider, FDN purchases UNE loops from BellSouth.

FDN disputes BellSouth's view of our FDN order, initially noting that BellSouth's position is absurd because a UNE-P is a type of UNE loop. In its Response FDN states:

> Shortly after the Commission issued its award in the FDN arbitration, the Commission permitted Supra Telecom to incorporate the FDN arbitration award into its own interconnection agreement. The relief the Commission provided Supra, which was based on the FDN award and on the record from the FDN arbitration, expressly obligated BellSouth to continue providing its DSL service when an end-user converts its voice service to Supra utilizing a UNE-P line. It would make no sense at all for the Commission to sanction an inconsistent result here, as BellSouth requests.

Finding

We agree that in some sense a UNE-P is a form of loop, as argued by FDN. We also note that we concluded on reconsideration in Docket No. 001305-TP (Supra/BellSouth arbitration) that BellSouth was obligated to continue providing FastAccess when a customer converts his voice service to Supra using a UNE-P line. However, we believe the two proceedings are distinguishable. In the Supra docket, Supra, who currently is a UNE-P provider, expressly complained that BellSouth was disconnecting FastAccess when Supra migrated a FastAccess customer to UNE-P. In fact, the approved language in the Supra/BellSouth agreement implementing this provision is limited to UNE-P:

> 2.16.7 Where a BellSouth voice customer who is subscribing to BellSouth FastAccess internet

> service converts its voice service to Supra utilizing a UNE-P line, BellSouth will continue to provide Fast Access service to that end user.

In contrast, as noted by BellSouth, there is no mention in the FDN proceeding of continuing FastAccess in conjunction with UNE-P because FDN represented itself as not being a UNE-P provider; rather, they obtain UNE loops from BellSouth, not UNE-P.

We find that BellSouth's language, which references UNE loops, shall be adopted.

B. Section 2.10.1.2

BellSouth language: None

FDN language:

> For purposes of this subsection 2.10, BellSouth xDSL services include, but are not limited to, (i) the xDSL telecommunications services sold to information services providers on a wholesale basis and/or other customers pursuant to any BellSouth contract or tariff, and (ii) retail information services provided by BellSouth that utilize xDSL telecommunications provided by BellSouth.

We find that BellSouth's obligation to continue providing high-speed Internet access service is limited to its FastAccess information service.

C. BellSouth Section 2.10.1.5; FDN Section 2.10.1.5.1 and 2.10.1.5.2

BellSouth language:

> 2.10.1.5 BellSouth may not impose an additional charge to the end-user associated with the provision of FastAccess on a second loop. Notwithstanding the foregoing, the end-user shall not be entitled to any discounts on FastAccess associated with the purchase of

other BellSouth products, e.g., the Complete Choice discount.

FDN language:

2.10.1.5.1 BellSouth may not impose any additional charges on FDN, FDN's customers, or BellSouth's xDSL customer related to the implementation of this Section 2.10.

2.10.1.5.2 The contractual or tariffed rates, terms and conditions under which BellSouth xDSL services are provided will not make any distinction based upon the type, or volume of voice or any other services provided to the customer location.

In its Position BellSouth indicates that it currently provides a $4.95 Complete Choice discount to its retail voice customers who subscribe to both Complete Choice and FastAccess. It objects to FDN's proposed language because it presumably would require BellSouth to offer this discount to FDN's voice customers who subscribe to the stand-alone FastAccess service. BellSouth contends nothing in federal or state law mandates that it ". . .pass on a combined offering discount to customers who fail to meet the conditions for the combined offer." It notes that anomalous discrimination could occur. For example, a BellSouth FastAccess business customer who did not also subscribe to Complete Choice would pay $79.95 per month. However, under FDN's theory, a FDN FastAccess business customer, who also did not have BellSouth's Complete Choice, would instead pay $75.00. BellSouth observes that its proposed language is consistent with the comments of two of the Commissioners who participated in the agenda conference dealing with the parties' motions for reconsideration, where they stated that there may be justification for affording a BellSouth customer a discount when multiple services are provided in conjunction with FastAccess. Finally, BellSouth asserts that FDN's language effectively requires the stand-alone FastAccess offering to be identical to BellSouth's standard retail FastAccess service. However, the stand-alone product BellSouth proposes to offer will not have a back-up dial-up account, and will be billed only to a credit card.

FDN considers its proposed language to be non-discrimination provisions that are necessary in order to achieve the goal of our FDN arbitration order. FDN alleges that its §2.10.1.5.2 ". . .simply requires BellSouth to provide its xDSL service on a stand-alone basis without regard to other services that BellSouth may provide the end-user. FDN is particularly concerned about the impact of product "bundles" of voice and data services in which an excessive share of the "cost" of the bundled services is inappropriately imputed to the xDSL services that end-users acquire an [sic] individual basis." FDN further argues that we must reject BellSouth's proposed language in its §2.10.1.5, which disqualifies FDN voice customers who retain their FastAccess from receiving discounts associated with purchasing other BellSouth products. FDN states that BellSouth's linking of discounts on FastAccess to a customer's buying BellSouth voice products ". . .would constitute virtually the same type of tying arrangement that the Commission found unlawful in the first place."

Finding

As noted by BellSouth, this issue was debated by the presiding panel at the October 1, 2002, Agenda Conference. After much discussion, there was agreement that there could be legitimate justification for discounts for those customers that obtain all of their services from BellSouth, such as a package price.

Accordingly, we believe that there could be circumstances where a customer is entitled to a discount that need not be made available to a customer who subscribed only to FastAccess. As such, we find that BellSouth's proposed language shall be adopted, while excluding FDN's proposed language.

D. BellSouth Section 2.10.1.6; FDN Section 2.10.1.5.4

BellSouth language:

2.10.1.6 BellSouth shall bill the end user for FastAccess via a credit card. In the event the end user does not have a credit card or does not agree to any conditions associated with Standalone FastAccess, BellSouth shall be relieved of its obligations to continue to provide

FastAccess to end users who obtain voice service from FDN over UNE loops.

FDN language:

2.10.1.5.4 BellSouth will continue to provide end users receiving FDN voice service and BellSouth xDSL service the same billing options for xDSL service as before, or the parties will collaborate on the development of a billing system that will permit FDN to provide billing services to end-users that receive BellSouth xDSL services.

BellSouth states that it bills its end users for FastAccess either on their bill for BellSouth voice services or on a credit card, and notes that its billing systems currently can only generate a bill where the end user is a retail voice customer. Accordingly, since the FastAccess end user will be a FDN voice customer rather than a BellSouth voice customer, BellSouth opines that its only option is to bill such FastAccess customers to a credit card. Further, BellSouth asserts that if the customer declines to pay by credit card, BellSouth should no longer be obligated to provide FastAccess to the customer.

BellSouth also notes that in order to provision the FastAccess on a second loop, there may be occasions where BellSouth will need to re-wire the end user's jacks. Where this occurs, the customer will need to approve the re-wiring and provide BellSouth access to the premises. Here too, if the customer objects to the re-wiring or providing BellSouth access, BellSouth believes it should be relieved of its obligation to provide FastAccess.

FDN objects to BellSouth's proposed language in Section 2.10.1.6. In its Motion to Approve, FDN contends that BellSouth has provided no justification for why, when a FastAccess customer does not take his voice service from BellSouth, he must provide a credit card for billing. FDN believes that such a practice would inconvenience and annoy many customers. As an alternative, FDN proposes that FDN and BellSouth arrive at a mutually acceptable arrangement whereby FDN could bill customers for BellSouth-provisioned FastAccess. FDN asserts that "[i]t is not reasonable for BellSouth to incur the additional expense of provisioning xDSL

on an expensive stand alone loop but then claim that it is too expensive to send a paper bill to the customer for that service." Moreover, FDN believes that "BellSouth's alleged billing problems should not serve as an excuse relieving BellSouth of its obligation to provide ALEC voice end users xDSL service, thereby suppressing competition in the voice market."

Finding

Unfortunately, neither of our two prior orders in this proceeding nor the discussion at the reconsideration agenda conference provide unequivocal direction as to this implementation matter. We believe it is reasonable and is not discriminatory for BellSouth to request FDN FastAccess customers to be billed to a credit card, because this is an option available to BellSouth's own customers. However, we do not believe that BellSouth discontinuing a customer's FastAccess service merely because he declines to offer up a credit card for billing comports with the intent of our prior decisions. To the contrary, we believe it is incumbent upon the parties to remedy any billing problems. We agree with BellSouth that where a FastAccess customer does not provide access to his premises to perform any needed re-wiring, BellSouth should be relieved of its obligation to offer FastAccess. Because the parties have agreed that a FastAccess customer who migrates his voice service to FDN will have his FastAccess provisioned on a standalone loop, then it appears to us that situations like this may arise where it is technically infeasible for BellSouth to provide service. We believe that neither party's language is precisely on point, though FDN's comes closest.

We find that FDN's language should be modified to reflect that: (a) BellSouth may request that service be billed to a credit card but cannot discontinue service if this request is declined; (b) BellSouth may discontinue FastAccess service if access to the customer's premises to perform any necessary re-wiring is denied; and (c) where a customer declines credit card billing, it is incumbent on the parties to arrive at an alternative way to bill the customer. Accordingly, the following language shall be adopted for inclusion in the parties' agreement, while noting that the parties are free to negotiate alternative language that comports with this Order:

> 2.10.1.6 BellSouth may request that the end user's FastAccess service be billed to a credit card. If the end user does not provide a credit card number to BellSouth for billing purposes, the parties shall cooperatively determine an alternative means to bill the end user. If the end user refuses to allow BellSouth access to his premises where necessary to perform any re-wiring, BellSouth may discontinue the provision of FastAccess service to the end user.

We note further that if parties are unable to reach an agreement on an alternative means to billing the end user, parties may petition the Commission for relief as appropriate regarding the dispute.

E. *BellSouth Section 2.10.2.5; no comparable FDN language*

BellSouth language:

> If the end user does not have FastAccess but has some other DSL service, BellSouth shall remove the DSL service associated USOC and process the FDN LSR for the UNE loop.

As noted by BellSouth, this issue again pertains to whether we ordered BellSouth to continue providing its interstate tariffed DSL transport service, or its retail FastAccess Internet access service. As discussed above, we believe we were quite clear that our decision pertained solely to the provision of FastAccess Internet access service, not the interstate DLS transport offering.

Accordingly, we find that BellSouth's language shall be adopted.

F. BellSouth Section 2.10.2.6; FDN Section 2.10.2.4

BellSouth language:

> If the end user receives FastAccess service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligations under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall

> have three days to make the election as to which line FastAccess service will be provisioned on as set forth in 2.10.2.7 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current and future FastAccess services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's FDN services.
>
> FDN language:
>
> If the end user receives xDSL service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligation under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall have three days to make the election as to which line xDSL service will be provisioned on as set forth in 2.10.2.5 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current xDSL services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's services.

BellSouth states that its addition of "and future" is intended to indicate that it is permitted to discuss with the end user how his FastAccess service would be provisioned prospectively, including

> (e.g. if a new loop is to be used, how the rewiring would be performed); how it would be billed (e.g. if the customer currently has a multiservice discount, how the billing would change); and any other necessary information the customer would need in order to proceed with the transition to FDN voice services. (BellSouth Position, p. 10)

BellSouth argues that prohibiting it from discussing such matters with the end user could undermine the transition being a seamless one; moreover, failure by BellSouth to disclose such pertinent information could subject BellSouth to customer complaints. Similarly, BellSouth's insertion of the word "FDN" in the last sentence is designed to clarify that customer referrals to FDN should only pertain to FDN-provided services; BellSouth believes that inquiries about FastAccess, a BellSouth-provided service, should be handled by BellSouth, not FDN.

FDN contends that if BellSouth must contact FDN's voice customer, such contact should be restricted to ". . .discussing and validating *current* facilities and services." Fundamentally, it appears FDN is concerned that during such customer contacts BellSouth will demean the FastAccess service that will be received by the customer due to his switching to FDN's voice service. FDN believes such contacts are a "license for mischief."

Finding

It is unclear as to what FDN means by "current facilities and services," in that it has agreed to BellSouth's proposal to provision FastAccess for customers who migrate to FDN voice on a separate, stand-alone loop. It appears inevitable that a FastAccess customer will experience a change to his current service, because the line on which the FastAccess is to be provisioned will no longer also have voice capabilities. Contrary to FDN's view, we believe that BellSouth would be negligent if it failed to inform the customer of any potential change in his service. However, we note that BellSouth's use of the phrase "and future" does not render the sentence in which it appears completely clear and unambiguous to us; nevertheless, we accept BellSouth's representation that customer contacts will be for the limited purposes described in its Position. We acknowledge FDN's concerns and trust that BellSouth's customer contact when service is modified would be minimized and competitively neutral.

Accordingly, we find that BellSouth's language shall be adopted.

G. BellSouth Section 2.10.2.8; no comparable FDN language

BellSouth language:

> If a second facility is not available for either the Standalone Service or the newly ordered UNE loop, then BellSouth shall be relieved from its obligation to continue to provide FastAccess service, provided that the number of locations where facilities are not available does not exceed 10% of total UNE orders with FastAccess.

BellSouth again argues that providing its FastAccess service on a standalone basis is the only way it can satisfy our decision without violating various federal orders. It asserts that if it were to put BellSouth's high-speed Internet access service on a UNE loop,

> BellSouth would be providing its tariffed DSL service for itself in a way that is different from how it would be providing it for other ISPs. This would put BellSouth in violation of the FCC's orders in the Computer Inquiry III cases; in violation of the FCC's Open Network Architecture orders; and in violation of its own federally filed CEI plan.

Moreover, BellSouth contends that if it put FastAccess on FDN's UNE loops, other ISPs would argue that BellSouth was obligated to make its interstate DSL offering available to them on UNE loops, too. As a compromise, BellSouth offers that if it is unable to provision standalone FastAccess on more than 10% of UNE orders, it would ". . .have to figure out for itself some other way of meeting its obligation to continue to provide FastAccess." (Position, p.11)

FDN objects vehemently to BellSouth's proposal, stating that it is ". . .unsupportable and would eviscerate the Commission's Arbitration Order." FDN states that the record in this proceeding provides no basis for BellSouth being excused even a single time from complying with this Commission's decision, let alone 10% of the time.

Finding

We note that BellSouth argued on reconsideration that to put its FastAccess service on a UNE loop would be a violation of its

FCC tariff. In the Reconsideration Order, we determined that we were not constrained by a FCC tariff and that under Section 251(d) we can impose additional requirements as long as they are not inconsistent with FCC rules, orders, or federal statutes. We concluded that BellSouth had not shown that our decision was in conflict with any controlling law and thus dismissed BellSouth's argument.

Our decision states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." We have found no basis in our orders or deliberations in this proceeding to carve out an exception, whether it be for a single customer or 10% of FDN's UNE orders. Accordingly, BellSouth must comply with our specific decision.

We find that Section 2.10.2.8 shall not be included in the parties' agreement. However, if BellSouth believes that it is important and correct to continue to provide FastAccess over a separate facility and such facilities are not available and the parties can not reach an agreement about how the Fast Access would be provisioned, parties can file a petition seeking relief as appropriate.

Accordingly, the parties shall file the final interconnection agreement in accordance with the specific findings as set forth in this Order within 30 days from the issuance date of the Order resolving the disputed contract language.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the parties shall file the final interconnection in accordance with the specific findings as set forth in this Order. It is further

ORDERED that the parties shall file the final interconnection agreement within 30 days from the issuance date of this Order resolving the disputed contract language. It is further

ORDERED that this docket shall remain open in order that the parties may file a final interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st day of March, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak

Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.